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"A competent knowledge of the laws of that society in which we live is the proper accomplishment of every gentleman and scholar."—*Blackstone*

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## Hays v. Heidelberg--Again.

[The following vindication of the decision of the Supreme Court, in Hays *vs.* Heidelberg, is from the pen of a highly intelligent and esteemed correspondent. Its publication in the November number was prevented by the loss of a portion of the manuscript, in the process of transmission. The opinion of the Court (9 Barr 203) was delivered by Mr. Justice Bell, whose integrity, learning and ability none will question.

Ed. Am. Law Jour.]

HAYS *vs.* HEIDELBERG.

No self-imposed task can be easier executed than that of convicting any Court of the commission of error, or even of absurdity, if it is allowable *in limine* to assume for them a position they never intended, or attempted to occupy. By such an ingenious, if not ingenuous license, your October correspondent ("W.") has succeeded, to his own satisfaction, in proving that our Supreme Court in the above case, have maintained doctrines "novel" to him,

and "unsatisfactory to the profession," as represented by him. It will be readily established, *e contra*, that he has not apprehended or approached the point decided — that the novelty is of his own fiction, and the judgment pronounced, as ancient as the abhorrence of the common law to all fraud, (Lord Mansfield, Cowp. 434, Lord Holt, Skin. 357, Chancellor Kent, 2 Johns Ch'y 49) and is well illustrated under the Statutes as early as Twynes Case, 44 Eliz. 3 Co. 80.

What was decided will best appear by citing the words of the opinion Judge.

"It is a part of the plaintiff's case, that the sale was made without consideration, being in fact a contrivance to transfer the legal estate to the apparent vendee, subject to a parol trust for the benefit of the creditors and heirs of the decedent." 9 Barr 205.

The conclusion assailed follows in brief compass:

"The sheriff's conveyance being purely voluntary, and its direct tendency to hinder and delay the creditors of the decedent in the remedies afforded them by law, it is, unquestionably, as to them, fraudulent and void." Ibid.

The slightest comparison will satisfy the mind, that the point manufactured for impeachment essentially varies from that *really* ruled. "W." states the question thus: "Whether a *bona fide* sale to the administrator, under the above circumstances, was valid? The true question was —Could such a sale be pronounced to be *bona fide* ?" In the essential attribute of *good faith*, with which he gratutitously crowns the sale in question, it was flagrantly deficien t.

Did the Court mistake or misapprehend the plaintiff's case, as they presented it. *Imprimis.* They claimed under a deed, for a consideration of $1 from William Wilkins, which recited that "he had purchased the property" in trust for the creditors and heirs of S. S. "and conveyed it to them," under the same trust under which he had held it.

William Wilkins (administrator and vendee) *called by plaintiffs*, testified—"I purchased the tract in question for the creditors and heirs of decedent. I never pretended to claim it as my property. The trust, on my part was open and notorious. I supposed until recently it had been declared in writing. All the world knew I did not pretend to claim it as my own. I paid nothing for the property when I purchased it. *The receipt by the Sheriff was a mere matter of form. No money passed.* I PURCHASED AS ADMINISTRATOR."

Walter Forward, (also Administrator)—"I recollect a consultation among the administrators with regard to the sale of this property, as the only method remaining to liquidate the debts of the deceased. The guardian did not object to the sale being made, when I explained to him that the object was the payment of the debts, and to dispose of it to the best advantage for this purpose; and the balance, if anything, for the children. I considered it a measure expedient to relieve the estate."

The effort to re-sell the land, in small parcels, was made and failed, by a change of the times. The land remained in the same state, the taxes were assessed and paid on it as the decedent's estate for eighteen years. It was then sold at Sheriff's sale to James Ross, Esq. under proceedings, now admitted and decided (Payne *vs.* Craft, 7 W. & S. 465) to have vested in him and his alienee, the defendant, in both cases—a perfect title, unless the prior sale to the administrator now set up, passed the whole estate, legal and equitable, beyond the reach of creditors, when liens have been kept alive, but never satisfied. The trust, on the face of the deed to the plaintiffs, the defendant contended, was extinguished by the sale to Mr. Ross on his execution, and that of another creditor. It will now be shown, exclusive of the reason and authority in the reported opinion, while following on the path illumined by its light—

I. *That such a sale as that made to the administrator would have been fraudulent and void, if privately made by a living debtor.*

1. *Because, it was without any consideration.*

2. *Because of the trust.*

3. *Because it was contrived to hinder, delay and defraud creditors.*

II. *Such sale was equally fraudulent, when perpetrated at the instance of an Heir or Executor, as if by one in full life.*

III. *Such sale was not aided by the employment of judicial process in making it.*

A fraudulent conveyance within the meaning of the Statute, 13 Eliz. ch. 5, is, in reality, none at all; but a mere formal transfer, executed, not to give the alienee the property, but to induce the belief that he has it, that he may hold it in trust for the debtor. Ellis Dr. & Cr. 158.

No sale ever reflected more graphically every feature of this definition, in all its legal deformity, than that under scrutiny. A judgment for $50 before a Justice, was brought to bear on the land by the procurement of defendants, in pursuance of their preconcerted arrangement, and a sale effected, not to give the alienee the property, (for this he indignantly disclaimed,) but to induce the belief that he had it, when *re vera*, the beneficial interest was not changed. The purchaser held it, *as before*, subject first to the liens of the creditors according to their legal priority, but if it produced more than satisfied them all, any surplus proceeds were to be held for the children.

On this sale not one farthing passed. It was merely sham and nominal — a fictitious and ineffective form — an empty and unreal mockery. It was null and void,

1. *Because it was without any consideration.*

It may be safely asserted that, in a Court of Common Law, whether the question be produced on a demurrer, or special verdict, or receive its determination from a Jury—*the total want of consideration* as against a subsequent purchaser, has in general been considered conclusive evidence of fraud. Roberts Fraud. Convey. 73.

The presumption of fraud, raised by the Statute, from the want of a valuable consideration, was esteemed by the Lord Chief Justice in Twyne's case, to be so strong as to dispense with proof of *actual* and visible fraud. ibid. 427.

This authority dispenses with the fancied necessity for proof of actual fraud.

In the report of Twyne's case (Moor 638) the sixth badge of fraud enumerated was: that the donee had the use of the goods—bought and sold—killed the cattle, *changed* them and spent the corn in the family. All this was colored by an *account* made out annually between the donor and donee; *but no money was actually paid* to the donee.

How strikingly similar was the coloring effect of the account and the receipt! What "W." dubs "*an effort of financial skill rare in those early days*", in England and Allegheny, was alike absent in both cases, and alike disastrous to their fairness and stability.

2. *The sale was void because of the trust.*

On the plaintiff's own exhibition, it was made with the intention of all parties about it, contriving and executing, to prevent the creditors entitled to its proceeds from obtaining its fruits at that time — but in lieu thereof to hold out to them a future hope, that, instead of receiving their priority or dividend, they might some day all receive, *cent per cent*, and further if possible a surplus might be saved for the decedent's children. This was the private purpose, or the one made known to "the world" initiated — the public appearance was to be that of an absolute sale.

Fraud is always apparalled with trust—(*nomen speciosissimus*)—and trust is the cover of fraud. Twyne's Case.

A sale purporting to be absolute, but attended with a secret trust, holds out false colors, and is evidence to prove the contract different from what it really was. The law presumes that he who buys, and takes evidence of the contract, which is in its nature false, intends to use it for the purposes of deception, and to defeat that purpose, declares the contract to be void for that cause. Parker *vs.* Pattee, 4 N. H. 178.

A sale of goods by a person in debt, in order to be considered *bona fide* with respect to creditors, must be made without any trust whatever, express or implied. Ibid.

The true interpretation of the statutes of Elizabeth is, that fraud under these statutes consists in the debtor's reserving to himself some interest or benefit out of the property conveyed. Wallace's note to 1 Smith's L. C. 41.

The fraud which renders void the contract is a secret trust accompanying the sale. Coburn vs. Pickering, 3 N. H. 14; 12 Mass. 110.

The leading object of the Stat. 13 Eliz. ch. 5, was to prevent those collusive transfers of the *legal ownership*, which place the property of a man indebted out of the reach of his *bona fide* creditors, and leave to him the beneficial enjoyment of that which ought in conscience to be open to their legal remedies. Roberts Fraud. Con. 484.

Care must be taken that there be no secret understanding, constituting a trust in the creditor, in derogation of the ostensible alienation, or the transfer will be deemed a cover by which other creditors will not be prejudiced; or in other words a change of estate will not under such circumstances be considered as having taken place. Jackson &c. *vs.* Brownell, 3 Caines 224.

The two last indicia of fraud in *Twyne's Case* were a trust between him and his debtor, and the gifts stating on its face, that it was made honestly, truly and *bona fide*. Ibid.

So that the precious fact relied upon by "W." that the Sheriff's deed, claimed under, was absolute on its face, and that there was no trust of any kind apparent on it —when such trust really existed, was *per se* a glaring badge of fraud which, from *Twyne's case*, down to the present inclusive, has condemned all similar contrivances. Every departure from truth is dangerous.

But "W." says, that the purpose or intentions of the purchaser when he buys can have no effect to convert an absolute sale by the Sheriff into a trust in his hands.

But see Contra 12 Pickering 89, 2 Fairf. 202, 3d do. 515, Borland *vs.* Mayo 8 Alab. 104, U. S. Dig. (1847) Frauds §62, 63.

The law says: Fraud consists in intention. Intention is a fact. Moss *vs.* Biddle, 5 Cranch 387.

The validity of a deed does not depend on the consideration. If the purpose be iniquitous, the conveyance will be void, though the consideration be valuable, not voidable—but void—utterly void. Wadsworth *vs.* Marsh, 9 Conn. 481, Swift's Dig. 282, 5 Day 341.

No title passes to a purchaser guilty of fraud in obtaining a sale, whether it be private or judicial. All that is said or done by the purchaser with a fraudulent intent is evidence. Hoffman *vs.* Strohecker 7 W 86.

Fraud in the purchaser at a sale *by the law* would of course vitiate his title. That fraud consists only in fraudulent intention. The test of fraud was principally in the circumstance whether or not the transfer conveys

the whole interest of the debtor. Wallace's note to Smith's L. C. p. 84.

An intention to obstruct creditors in subjecting property of the debtor to the payment of other debts, renders a sale, *ipso facto*, invalid, and the motive or intention may be proved out of the deed. Vernon *vs.* Morton, 8 Dana 263.

Declarations of the purchaser of intention in making a fraudulent purchase under the Statute of 13 Eliz. are admissible in evidence to defeat it. Kimmell *vs.* McRight, 2 Barr 38.

It was not necessary that the Sheriff should be involved in the contemplated fraud, or *particeps criminis*, because,

Any concert between the purchaser at Sheriff's sale, and the defendant in the execution, by which a trust is created between them, is covinous. Arnsley *vs.* Carlos, 9 Alab. 973; U. S. Dig. (1847) Frauds §63.

If a purchaser at Sheriff's sale, by a fraudulent combination with the judgment debtor, is enabled to purchase the property for less than it is worth—the benefit of which the latter is to reap, the whole sale is fraudulent and void. Storall *vs.* F. & M. Bank.

It would be perilous to contend that no such combination existed as to this sale, between the purchaser and judgment debtors, who were represented *in eadem persona*, and it requires no less assurance, to turn round the creditors to a fund diminished by executions, to keep from the sale every friend of the family, who would have been present and bidding, if they had not been assured that the children would be better provided for by their absence, than their competition with the creditors at a fair, full, unreserved sale.

As to W.'s position, "that the Court was mistaken in assuming that the Sheriff's sale, in this instance, was any trust at all," it involves an allegation that the purchaser (clarum et venerabile nomen) meant to be false to his pledges to purchase under the preconcerted arrangement, and he (W.) has surely forgotten that the deed from that Sheriff's vendee, under which alone the plaintiffs claimed, was subject to that identical trust which they called him to prove—under which he always honorably held, viz: "for the creditors and heirs of the decedent," and

subject to which only had he conveyed to them. If the Court fell into this error, it was by the confession and ratification of said trust by the plaintiffs, and to which they were irresistibly impelled—for they could claim only under said trust, or not at all—having exhibited no other title. They claimed not as heirs, or alienees of heirs, but as purchasers under the administrator—loaded with the trust which he never repudiated.

3. *The sale was void, because made to hinder, delay and defraud creditors.*

This Sheriff's sale, if successful, would have substituted for the hold of the creditors on real estate, mere personal remedies against the trustee, who was self-constituted, and gave neither bond or security, and, as to them, acted wholly *invita minerva.* In place of their legal rights, was sought to be forced on them a trust fund not subject to their grasp, as was their lien on the decedent's land, arising at our common law, even as limited by the act of 1797. In this aspect the sale was, to use the strong words of the Statute itself, contrived of fraud, covin, collusion and guile, to delay, hinder and defraud creditors; not only to the let or hindrance of the due course and execution of law and justice, but the overthrow of true and plain dealing between man and man.

Judgment creditors, with the means of payment in their hands, need not wait until it shall please assignees to sell real estate, although they were legally appointed. Clark *vs.* Israel, 6 Binn 390.

A purchase, made with intent to defeat another judgment creditor, in obtaining execution is *mala fide* and void against him. Streeper *vs.* Eckert, 2 Whart. 389.

A purchase of property, with notice of a judgment, bought for the purpose of defeating the plaintiff's remedy is void—Wickham *vs.* Miller, 12 Johns 320—although the purchaser paid a full price. Waterbury *vs.* Sturtevant, 18 Wend. 353. And the same principle held in Geiger *vs.* Welsh, 1 Rawle 353.

When a sale of property, *under execution,* is brought about by the defendant in concert with others, with the avowed object of defeating the

interest of a third person in the property, such sale will be deemed fraudulent and void, although the execution issued on a valid and unsatisfied judgment. Beale *vs.* Guernsey, 8 Johns 486; Crary *vs.* Sprague. 12 Wend. 241.

A sale of property *for a full price*, if purchased with a design to hinder and delay creditors, is fraudulent and void, as to them. Trotter *vs.* Watson, 6 Humphrey 509; Peck *vs.* Kelly, 2 Kelly 1.

A purchaser, under the execution of a *bona fide* creditor, is not protected by its merit, in a purchase which he makes in combination with the debtor, to hinder, delay or defraud other creditors. Among facts, which are badges of fraud, are contrivances to protect the estate from other creditors. Yoder *vs.* Standiford, 7 Monroe 485.

Where it appears on the face of a deed of trust, that the motive for making it was to prevent a sacrifice of the property, a bad motive is shewn —a motive to obstruct the ordinary process of the law in the subjection of property to the payment of debts, which vitiates the whole deed. Vernon *vs.* Morton, 8 Dana 263.

To prevent a sacrifice of property under execution is, as to creditors, a fraudulent purpose, and such a declaration on the face of a deed, vitiates it as to them. Purchasers under such a deed have notice, and creditors may reach the estate in their hands. Ward *vs.* Trotter, 3 Monroe 3.

## II. *Such a sale or purchase of an Administrator is equally within the Statute, as one by a living grantor.*

A fraudulent conveyance is not only restrained when made by the vendor himself, but generally, every conveyance made of purpose and with intent to deceive, &c. shall be void. Roberts Fraud. Con. 588.

A fraudulent conveyance by the heir is void; so is one by the executor or administrator of the property deceased. Doe *vs.* Fallows, 2 ——— 460; 2 C. & J. 491; Bateman's Case, 1 Mod. 76.

If an heir have made a fraudulent and collusive conveyance to defeat the creditor of his remedy on the lands descended, it is void by the Stat. 13 Eliz.; 2 Leon. 11, per Dyer; Brooke Debt 238; Plowd. 441; Poph. 155. So if an executor make a fraudulent conveyance of the personal assets, the creditors shall avoid such conveyance by virtue of the same Stat. Cro. Eliz. 405. For by such fraudulent conveyance, nothing passes, as to the creditors, out of the grantor, but the property remains as assets in the hands of the representative, to answer the demands of the ancestor's or testator's creditors. 5 Rep. 60, Dyer 149 a & Note 180; Roberts Fraud. Con. 602.

Whenever an executor or administrator disposes of the assets of decedent without valuable consideration, the creditors, &c. may follow such

assets in equity. Paget *vs.* Hopkins, Gilb. Eq. Rep. 111; 4 Ves. Jr. 652. This doctrine fully investigated in Penna. in Fetue *vs.* Clark, 11 S. & R. 380.

III. *Such fraudulent sale is not aided by the employment of legal process to carry it into effect, or make the conveyance.*

Where a thing is by law forbidden to be done, the prohibition extends to every circuitous mode of effecting the same. *Volus circuitii non purgatur.* What cannot be done *de directo* ought not to be done *per obliquum.* Roberts Fraud. Con. 587; 11 Rep. 74.

All fraudulent judgments and *executions* are within the Statute of 13 Eliz. It seems clear that such covinous and circuitous proceedings are void by the common law—(Brooke Tit. Covin & Collusion) Wallace's note to Smith's L. C. p. 59—nor shall any man avail himself as it seems of the operation, consequence or conclusion of law, upon his acts to defeat his creditors. Lord Hale, 1 Ventr. 257.

It is even a great aggravation of the offence, to make use of legal process in the accomplishment of a fraudulent purpose, as if a man intending to steal a horse, take out a replevin, and thereby obtain a delivery of the horse from the Sheriff. 2 Inst. 108.

A sale of land *under an execution*, if the purchase is made for the purpose of hindering, delaying and defrauding creditors of the defendant whose land is sold, is void as to all purchasers or creditors—prior or subsequent. Such a sale stands on no better footing than a sale made for that purpose by the defendant himself—the Sheriff being used as a mere instrument to effect this object. Duncan *vs.* Forsyth, 3 Dana 209.

Such a Sheriff's sale *to an executor* was pronounced void by President Judge Grier, and his ruling adopted in Stuck *vs.* Mackey, 4 W. & S. 199.

A sale made *ostensibly under execution*, but in fact, collusively for the purpose of screening the property from the defendant's creditors, stands on the same footing as a mere private sale. Stevens administrator *vs.* Barret administrator, 7 Dana 259.

*What, then, is the finale?*

A feoffment made by covin to defraud a judgment plaintiff and other creditors—the feoffer is still seized, as to the creditors, notwithstanding such feoffment. Humberton *vs.* Howgel, Hob. 72; Leonard *vs.* Bacon, Cro. Eliz. 233; Chan. Rep. 131; Hildreth *vs.* Sands, 2 Johns Ch'y 50; Preston *vs.* Crofut, 1 Conn. 427; 2d Hillyard Ab. (1st ed.) 326.

Notwithstanding such conveyance, the creditor may avail himself of all the remedies for collecting his debt out of the property which the law has

provided for creditors, and in so pursuing them, he may treat the property as the vendors. Owen *vs.* Dixon, 17 Conn. 142.

I have drawn largely from authority and precedents to vindicate the decision attacked, although perhaps it was supererogatory labor. Such citations may also be "novel" to W.; but, it is hoped, not "unsatisfactory to the Profession"—the "learned" Reviewer excepted.

C.

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## Supreme Court of Pennsylvania--Western District.

[Reported for the American Law Journal by JAMES S. CRAFT, Esq.]

### ABSTRACTS OF DECISIONS.

PITTSBURG, SEPT. TERM 1849.

*Gales* vs. *Hailman.*
*Hailman* vs. *Gales.* } DISTRICT COURT OF ALLEGHENY CO.

GIBSON, C. J.—In an action, by the Owners against the Carrier, for the value of Goods lost during transportation, the Carrier cannot set up in his defence that a portion of the value has been paid to the Plaintiff under an insurance effected by him.

The Plaintiff is entitled to recover the whole value of the goods lost by the Carrier, and the insurers are entitled to come in under such recovery for their reimbursement.

The suit is rightly brought in the name of the legal Plaintiff on the contract of bailment; and the recovery will be applied: 1st, to compensate the Plaintiff the residue of his loss, not received from the insurers; 2d, to repay the insurers—the action being as to this portion, equitably for their use, and the Plaintiff the Trustee.

The Carrier and Underwriter are not bound to contribute, as if both were insurers, to assist in discharging the policy.

In fresh, as well as salt water policies, the skill of the Master in the particular navigation enters into the calculation of the risk, and is therefore matter of substance. An action for money paid to the insured would not lie against the Carrier to reimburse the insurer. His remedy is in the name of the Owner, as above ruled.

*Boreland* vs. *Nichols*. [D. C. Allegheny co.] BELL, J. A widow's acceptance of a devise under a Will, under the Act of 1797, § 10, (re-enacted 1833 8th of April, § 11,) does not bar her dower in land aliened by her husband alone in his life time. The point is substantially the same as Leinaweaver vs. Stoever, 1 W. & S. 160.

*Elliot* vs. *Dunlavy*. [C. P. Allegheny co.] GIBSON, C. J. The principle that the conveyance of a non compos by record, is neither void nor voidable applies to a several title acquired by judgment and partition, although there is no personal caption and certificate.

*Alexander & Morell* vs. *Plumer & Crary*. [Clarion co.] COULTER, J. The pilot of a river boat, destroyed in passing over a dam, where the question was whether the boat was lost by the dam being an obstruction to the navigation, or whether by his negligence or unskillfulness in piloting her over it, is not a witness for the owners of the boat against the builders of the dam.

If a dam is an obstruction to the navigation at any stage of water, the owners of the boat are not bound during high water to wait until the river falls to pass it.

*Heath* vs. *Armstrong*. BURNSIDE, J. Warrants issued after the Land Office closed in 1794, are not evidence without proof from its books that the officers were legally authorized to issue them under the exceptions specified by the Acts, &c.

General principles regulating surveys stated.

*Ziegler, Proth'y & al* vs. *Commonwealth on the suggestion of Breninger*. [Butler co.] BURNSIDE, J. The Prothonotary of the Court of Common Pleas of a county of this Commonwealth is bound to make searches for judgments and give certificates of liens or their absence.

A Prothonotary is liable for a false certificate as to liens—although it was not sealed, and there was no evidence he was paid the legal fees for it.

*Moore* vs. *Long*. [Butler co.] BURNSIDE, J. A verdict in slander for the Plaintiff of "*one dollar damages, and that the Defendant pay the costs*," carries full costs.

*Hopewell Township* vs. *Independence Township*. Per Cur. The settlement of a pauper has a local habitation in respect to the Township itself—and the fragment of territory into which it falls (if the Township be divided) is to maintain the pauper, whether he had been chargeable to

the parent Township or not. Under the act of 1836 there was to be no contribution to subsequent maintenance as previously.

*Sankey* vs. *Reed.* [Mercer co.] Per Cur. Parol evidence is admissible to prove an agreement, made at the time of a general written revival, to confine the lien of a judgment, to one of several parcels of land originally bound by it.

*Garwin's Appeal.* [Mercer co.] BELL, J. The act of 1840 was not intended to limit the right of the Orphans' Court to review their decrees, except in the cases specified.

Items included in a guardianship, or other similar account, are not binding on creditors or sureties who, not being parties to such settlement, could not appeal from it.

*Minesinger* vs. *Mair.* [Warren co.] Per Cur. When a man draws on his debtor, he draws on the fund in his hands and not on his person for a loan, and when the debtor honors the draft there is a payment pro tanto. It is not a case of defalcation.

*Silverthorn* vs. *McKinster & al.* BELL, J. Where land is devised to be sold to pay debts, &c., and the surplus proceeds divided among legatees, it is not the subject of ejectment unless there is an election by *all* the legatees to accept it as land. The executors should be pursued under the act against delinquent trustees for account, &c.

A power to sell under a will may be executed, as regards the Statute of Frauds, &c. as a sale made by an individual of his own estate.

*Treasurer of Allegheny College* vs. *McCord.* ROGERS, J. It is not evidence of fraud admissible to sustain a defence against the payment of a note, that the agent of the payees, at another time and another place, made fraudulent representations to procure other notes for the same institution.

*McMahon* vs. *Sloan.* [Butler co.] BELL J. A sale of personal property invests even a bona fide purchaser with no more than the title the vendor had—nor is there any exception in favor of market overts, which have no existence here. [2 Kent Comm. 324, 20 Wend. 275, 2 T. R. 63 376, 2 H. Bl. 14, 5 T. R. 367, 2 Cowp. 335, 2 Stark 512, 16 Johns 159, 11 Wend. 80, 9 Johns 197, 13 Pick. 7 W. & S. 374, 8 S. & R. 500, 20 Wend. 266.] The exceptions are 1st, money, checks, notes, &c. termed "*currency*" which pass by delivery, only; 2d, where the true owner confers on the party selling to a bona fide vendee, the apparent right of property, or of disposal as agent, as where the owner with the *intention of sale* parts with the property, though under such circumstances of fraud as would authorize him to recall the possession from the hands of his vendee, and where he has given such evidence of the right

to sell, as by custom, &c. usually accompanies such authority, as a bill of lading.

Entrusting property on loan and for use by a father with a son, is not such a permission to the bailee to use the article as his own, as will mislead a purchaser from such bailee, and render the sale valid against the bailor and true owner. If the bailee asserted his ownership with the bailor's knowledge and acquiescence, it would be otherwise.

*Keymborg* vs. *Borbridge & Co.* [D. C. Allegheny co.] Per Cur. (Adopting Judge Lowrey's opinion.) A factor who had pledged goods consigned to him, and suffered them to be sold on execution against him, and the proceeds of sale applied to his own debt, is not a competent witness for the owner of the goods, in an action of Trover brought to recover said goods or their value from the purchaser—being adduced to prove that such purchaser bought them with knowledge that they belonged to plaintiff, and were not the property of said factor.

*Jester* vs. *Jefferson Township.* BURNSIDE, J. The Overseers of the Poor of a township are the parties next in interest to be substituted in ejectment on the death of the plaintiff, who, after the institution of suit, became a pauper, and chargeable.

*Dobbins* vs. *Brown & Williams.* GIBSON, C. J. To recover on a covenant of general warranty in a deed, there must be an eviction laid and proved, not that it need be necessary by process, or the application of physical strength, but by the legal force of an irresistible title—at the least there must be an involuntary loss of the posession.

A covenant of warranty does not extend to an entry by the authority of the State in the exercise of its eminent domain, as to make a Rail Road or Canal.

*Stump & Gunkle* vs. *Hutchison.* Per Cur. If a Bill of Lading contain the clause "*the dangers of the river and fire excepted*," it must be introduced into the Narr. If it is not—such conditional Bill cannot be received in evidence, for there is a substantial variance.

*Joyce's Estate.* Per Cur. The Court, at the instance of one seeking security, will not take a fund from a party who has a hold on it, to throw him on another, not in Court, especially if the lien of the latter had expired.

OCTOBER 15, 1849.

*Clark* vs. *Dougan.* [Butler co.] C. J. An intruder on land, who suffers himself to be assessed for less than the number of the acres in the warrant covering the ground on which he is located, deserts the lines of the tract, and thereby abandons his constructive possession altogether, and loses the benefit of it, as protecting him by the statute of limitations; if its continuity be broken, but for a year, it is gone.

If the Assessor assess but a part of it to the settler, he must return the residue as unseated, and the settler is guilty of a fraud in claiming by adverse possession, what he does not pay taxes for.

OCTOBER 15, 1849.

*Bollin* vs. *Sherer*. [Somerset co.] C. J. The act of 1729–30 respecting clandestine marriages, inflicts the penalty for violating it on the Justice, &c. only where the parents live within the province now Commonwealth.

*Commonwealth ex. rel.* vs. *Fullerton, &c.* [Westmoreland co.] COULTER, J. Although the name of the county, within whose territory a township is erected by a legislative act, may not be named, it will be collected from boundaries of streams, &c. well known; and the old townships are restricted to the limits left to them after setting apart the new township.

*Westerman* vs. *Means*. [Butler co.] COULTER, J. The condition of a bond being: That T. M., a claimant of part of the land sold, for which the bond was given, shall, on or before a day certain, release his claim, and if the same be not then released, a deduction to be made from the bond of the purchase money according to the number of acres claimed at the price of the whole. The time thus fixed is of the essence of the contract; and if the release be not procured by that day, the payment of the bond cannot be enforced as to the quantity of land stipulated to be released.

*Alexander* vs. *Herr*. [D. C. Allegheny co.] GIBSON, C. J. In an action for mesne profits, instructions that the Jury might find the expense of the plaintiff *in prosecuting this claim*, and such other damages as they may think the plaintiff entitled to recover from the evidence, held to be erroneous.

What may be recovered in such action?

*Hazelbaker* vs. *Reeves*. [Westmoreland co.] ROGERS, J. To take a case out of the Statute of Limitations, it is not necessary that the acknowledgment of the debt shall fix a precise sum—if it be so definite that a Jury can fix it with as much exactness as in cases where there is no plea of the Statute.

*Hugus* vs. *Walker*. [Somerset co.] COULTER, J. Evidence cannot be rejected because it may be impugned or weakened by that given against it.

The following charge, by President Judge J. S. BLACK, was adopted by the Court.

Where a man makes a parol sale and receives the purchase money, he cannot set up the statute of frauds against the validity of the contract. So where he makes a gift by parol, either to his son or a stranger, if the

donee has gone into possession in pursuance of the gift, and made valuable improvements on it, the land cannot be claimed back again. But such facts ought to be clearly and satisfactorily proved.

Where a son goes into possession of his father's land and makes improvements, a Jury is not to infer from that, in the absence of other evidence, that the father gave him the lands. Neither are loose declarations of the father to his neighbors in casual conversations, without any explanation how it came to be his, sufficient evidence of a gift. Still less are such things evidence of a parol sale, of which a Chancellor would decree specific performance.

*Petition of McCullough.* [Indiana co.] Per Cur. A limitation over is not necessary to a condition or conditional limitation attached to a devise of the profits of land to a widow—that she shall not marry.

On such widow's marriage, the wife's interest in the premises ceased —the right of possession devolved on the executors, and they become liable to account for the profits to the children or their guardian. But the Orphans' Court has no jurisdiction of a bill against the Executors to compel them to pay over the proceeds of such devise, although it has of a legacy.

*Snyder* vs. *Snyder's Heirs.* [Westmoreland co.] ROGERS, J. The plaintiffs below were Heirs claiming the possession, by virtue of a parol contract with their ancestor, under which he had received possession. Evidence that the vendee, on his death bed, delivered up the keys of the mill erected on the property to vendor, and told him to go and take possession, as he intended him to have it after his death, was offered to shew the necessity of tender of purchase money before suit brought, it being unpaid, and on the ground that the vendor was in possession by vendee's consent.

It was rejected because the offer was not attended by an offer of proof that the repossession was taken in pursuance of these death bed acts and declarations of vendee, and it could not be inferred that it was. (Marked "not to be reported.")

*Truby* vs. *Sybert.* [Armstrong co.] BELL, J. Although the parties be different, a record is admissible to prove the existence of a former action, with its legal consequences, as an independent fact. But not to prove any fact on which such judgment was founded unless it was between the same parties or privies. 3 Greenleaf R. 316, L. Raymond 744, 8 Shepl. 492, 1 W. & S. 360.

The rule 1 Greenleaf Evid. §195 was adopted.

Admissions made by a party do not bind him because they were made in a particular contest; but because they emanated from him, and it is not material when or where.

OCTOBER 19, 1849.

*Bell* vs. *Bell & Co.* [Cambria co.] COULTER, J. It is commendable delicacy for an Attorney to retire from the argument of a cause, when it becomes necessary for him to testify; but he may be a competent witness in a cause pending in which he is concerned as counsel.

S. P. decided in Laughton *vs.* Shields at this term.

*Thompson* vs. *Clark.* [Westmoreland co.] BURNSIDE, J. A widow may recover on the possession of land held by a title to her and her husband, which they had agreed to sell for considerations not fulfilled, the agreement not being acknowledged by her, and not ratified by her after her husband's death.

*Steener* vs. *Baughman.* [Westmoreland co.] C. J. Where the vendor conveys by courses and distances, his covenant of warranty extends to the entire quantity of land included by them—and although described to have passed to him by a chain of conveyance, the warranty is not restricted to the primitive bounds of the tract.

*Culbertson* vs. *Isett.* [Indiana co.] COULTER, J. The nominal payee of a note may be a witness to prove that the note was made payable to him for the use and accommodation of another person (the defendant) not a party to the note.

The Court will not reverse the Court below, in the absence of the facts on which they adjudicated.

OCTOBER 15, 1849.

*Craig* vs. *Shields.* [Westmoreland co.] ROGERS, J. The equitable title of a vendee under articles of agreement, on which a considerable portion of the purchase money has been paid, does not pass under a levy and Sheriff's sale of all his right, title and interest as Tenant by the Curtesy; although such misdescription in the levy, &c. was made by the Sheriff, or at the instance of the Plaintiff or his counsel, and although defendant knew of the error.

Such an equitable interest cannot be sold, although levied on as an estate for life, as above mentioned, *without an inquisition;* and although the vendor had disseised or obtained possession from the vendee.

The fact that defendant knew of it could be found by the Jury only on clear, distinct, and satisfactory evidence.

Under the circumstances of this case, equity would not presume that the vendee had abandoned his contract, or authorized the vendor to rescind it, although eighteen years had elapsed since its date, and the property risen in value by time—there being sufficient evidence of vendees' pursuit, and no improvements, &c. by vendor.

OCTOBER 29, 1849.

*Lobingrer* vs. *Mechlings Ex'rs.* [Westmoreland co.] Per Cur. When

one Executor conveyed land to the other, without taking security to the Heirs for the purchase money, it was decreed that he should account for their share to one of the Heirs entitled.

*McCleery* vs. *Henry.* [Westmoreland co.] BURNSIDE, J. The principle of Bantleon *vs.* Smith is a rule of property peculiar to Pennsylvania, and not now to be disturbed—but there is no lien on the land without the clause giving the right of re-entry. Sands *vs.* Smith, 3 W. & S. 9.

Articles of agreement for rent received cannot operate as a deed although no time be limited thereon.

*Coheck, for use* vs. *George.* Per Cur. When an examined witness is discovered to be interested, the only course left is to withdraw his testimony from the Jury. The truth of evidence to prove his incompetency may be determined by the Judge, or referred to the Jury, in his discretion.

A house erected on the soil of another, not being a chattel, belongs to the owner of the soil.

(Marked "not to be reported.")

*Reed* vs. *Reed* BURNSIDE, J. Where the vendee of land (by a parol contract) had possession, and the vendor said he had received all the purchase money but $40 00, the Court should have left it to the Jury, so that they might find a conditional verdict.

*Cavett's Appeal.* [From the Orphans' Court of Westmoreland co.] BELL, J. Bill of Review entertained three years after confirmation of proceedings in Partition, to correct an error by which a larger interest or share had been awarded to one of the parties thereto, than he was entitled to.

*McLain* vs. *Snyder Township School District.* [Jefferson co.] COULTER, J. The President of the Board of School Directors has no authority, as such, to make contracts for the Board, who can only act by a majority regularly convened, or by a Committee of their appointment.

*Bricker* vs. *Potts.* [Indiana co.] ROGERS, J. "You cut up a parcel of hats, and then swore a false oath against your father—that he did it. You swore a lie, and it is in black and white in Westmoreland county—you swore a lie, and it is on record at Greensburgh." These words with proper inuendoes of malicious mischief and perjury held actionable, without any colloquium of judicial proceedings, or of an oath judicially administered to plaintiff.

*Altman* vs. *Altman.* [Westmoreland co.] Where the defendent in a former ejectment, on being turned out of possession, institutes a second ejectment on the same title, proceedings will be stayed in the latter action, until the costs of the former are paid.

*Scarfe & Co.* vs. *McDonald.* [Allegheny co.] ROGERS, J. Although the value of the property is the ordinary measure of damages in Replevin, the jury may enlarge them beyond such value and interest where there has been an outrage in the taking, or vexation and oppression in the detention, as in an action of trespass. It is unnecessary for the plaintiff to resort to one action to repossess himself of his goods unlawfully taken, and another for his damages. 21 Wend. 144; 1 W. & S. 516; 10 John. 378; 20 Wend. 172.

*Wilson* vs. *Houser.* Defendants holding under color of title may resist successfully a plaintiff who claims under a fraudulent voluntary deed.

This charge held erroneous—"If the deed was voluntary, viz: without consideration other than love and affection, it might still be void against creditors, if at the time it was executed the grantor was engaged in a hazardous business, although there was no actual intention of defrauding any one,"—3 Pa. 160; 12 S. & R. 448; 1 Sm. L. C. 34.

The law is—that to avoid a conveyance by one indebted, the debts must bear some proportion to the property of the grantor, which may render the payment of the debts doubtful.

*Uplinger* vs. *Bryan.* [Armstrong co.] BURNSIDE, J. How far the Court will notice an error not assigned? 10 S. & R. 55; 2 Binn. 168; 17 S. & R. 277; 5 W. & S. 87.

The Court reserve this right, as in Anderson *vs.* Long, to secure substantial justice.

*Marple* vs. *Myers.* [Indiana co.] BELL, J. Reversions and remainders are not within the statutes of limitation, until the right of entry accrues by the determination of the precedent estate—therefore the statutes do not run against infants, claiming under their mother's estate in fee, until after the death of their fathers, being tenants by the curtesy.

*Jordan* vs. *Hurst.* [Westmoreland co.] COULTER, J. On a negotiable note endorsed when overdue, there is no necessity for demand and notice to charge the endorser—such endorsement being considered as the making of a new note, and imposing on the indorser the primary obligation of a drawer. Brown *vs.* Davy, 3 T. R. 80; Bank of N. America *vs* Barriere, 1 Y. 360; Snyder *vs.* Riley, 6 Barr 164, sustained; and Colt *vs.* Bernant, 18 Pick. 260; McKinney *vs.* Crawford, 8 S. & R. 351; disapproved.

OCTOBER 29, 1849.

*Bash* vs. *Bash.* [Westmoreland co.] Judgment on a verdict for plaintiff for $2,949 00 in a trial between the same parties as the case reported 9 Barr 260—affirmed on division of opinion—(COULTER, J. having been of counsel before appointment.)

*Stokely* vs. *DeCamp.* [Westmoreland co.] ROGERS, J. The Com-

missioner of Pensions appointed under the act of Congress, 3d March, 1837 — to judge and determine on all applications for pensions, &c.— with appeal to the Secretary of War, &c. is a special tribunal, and its judgments, decrees, &c. are final and conclusive, as to law and facts.

The certificate of William Wilkins, Secretary of War, awarding a pension to certain children of a revolutionary officer, cannot therefore be reviewed by this Court.

*Graham* vs. *Graham.* [Westmoreland co.] C. J. "This writ of error," (runs the opinion,) "was brought to confront this Court with its predecessors, and compel them to overrule two of their decisions (Falconer *vs.* Montgomery, 4 D. 232, and Passmore *vs.* Pelitt, 4 D. 271;) or one of our own (Graham *vs.* Graham, 9 Barr 254). This dilemma is, however, not presented. Although formerly unnoticed but not unknown, the cases in Dallas are clear and indisputable law.

The reasons given in the first for disregarding Hall *vs.* Lawrence, are not applicable where a party declined pressing his right to be heard at the proper time until, finding the cause going against him, insists upon a right he ought to have claimed before.

It is to be inferred from the expressions of the Court in Hall *vs.* Lawrence, 4 T. R. 589. that there was *notice* of the appointment of the umpire, and the time and place of his sittings—and *the want* of notice is equally deducible from the Pennsylvania cases. Chief Justice Shippen and his associates never applied these remarks "to a party who had put himself in the predicament of a spoiled child, crying after what he had rejected."

A party who has not insisted on the insertion of a clause in the submission for the appointment of the umpire before hand, and for his attendance at the meetings for the purpose of qualification, should not have the power to subject the other party to delay, and the chance of additional expense from a further examination of witnesses.

Before a party should drag his antagonist over the same ground, it should appear that he was ready and anxious, but not permitted to be heard. Where he has stood out with notice, or waived it by refusal to attend, the case is against him.

If a submission under the act of 1705 (1836) does not require an account to be reported, it is not required — and if it is to settle every matter in controversy, it is unnecessary; and not being subject to revision, its absence can do no harm.

*Emerson* vs. *McCabe.* [Indiana co.] COULTER, J. Where a note was given to raise funds to *launch* a partnership, evidence is admissible to defeat or curtail a recovery by shewing that the payee was unfaithful to his co-partners, the drawers of it.

*Wilson* vs. *Houser*. [Armstrong co.] ROGERS, J. Although a sheriff's sale would be irregular where condemnation was under an Alias Fi. Fa. while an extension of the original Fi. Fa. was in full force and not set aside, and an application made in time to set aside such second execution, or the writ of Vend. Exp's., or the sale before the acknowledgment of the sheriff's deed, would have been successful; yet such irregularity is cured by permitting the sale and deed to pass without objection. The debtor waives his right as against the purchaser.

NOVEMBER, 1849.

*Fast & Richey* vs. *Wilson*. [Fayette co.] BELL, J. If a creditor has the means of satisfying a debt due to him, either actually or potentially, and permits it to escape, his negligence discharges a surety for his debt; but it must distinctly appear that such means might legally have been retained by him in satisfaction, and was not deposited specially for any other purpose.

To authorize the introduction of separate items of testimony as parts of a connected whole, it must appear that they have some relevancy to the subject matter in dispute in themselves, or a *probable* connection between them and the facts offered to be proved, must be indicated.

*Gilbert* vs. *Watson*. [Washington co.] ROGERS, J. Forbearance to sue for a stipulated period is not a sufficient consideration to support a promise to pay the debt of another — if the promissee could not have sued within that time.

*Stephens* vs. *Myers*. [Greene co.] Per Cur. A defendant has no right by the act of 1806, to amend his plea after judgment on demurrer. If one demurrer is withdrawn, he should withdraw a defective plea before a second demurrer. Nor can the defendant have the benefit of an amendment at the trial, by filing a new plea.

*Shaw* vs. *Boyd*. [Fayette co.] COULTER, J. After a judgment has been removed to the Supreme Court and the judgment below reversed, and judgment entered for the plaintiff on the verdict, which was remitted to the Court below but no judgment found in the latter Court, it will be presumed there was one entered for the purpose of supporting a judgment on the plea of *nul tiel record* on a subsequent scire facias now brought into this Court.

Strong presumptions are tolerated in favor of records irregularly kept after great lapse of time.

Reciting the judgment entered in the Supreme Court as one of the lower Court, amendable.

The suggestion in the scire facias, that a feme covert in the original judgment of dower, she being the meritorious party to the proceeding,

had become sole, is immaterial if not put in issue by plea in abatement or otherwise.

*Linderman & Shepley* vs. *Berg.* [Fayette co.] Per Cur. The vendor of defendants in ejectment (having no reversionary interest) although conveying with warranty, is not entitled to admission as co-defendant.

Nor would a landlord be admitted as defendant where, with his application he lays ground for delay, by claiming privilege of continuance as a member of Congress until its adjournment.

*Abrams* vs. *Musgrove.* [Fayette co.] COULTER, J. An old man, disabled by palsy, directed a note to be drawn in the name of an agent, as his guardian, as the obligor, and to be signed by that agent who signed his own name with the addition of "Guardian." The agent is a competent witness without a release.

*Clemens* vs. *Gilbert.* (Washington co.] Per Cur. The certificate of a Justice of the Peace, attached to the entry of the appeal bail, but not contained among his docket entries — that "*Defendant offered to confess judgment for five dollars before rendering judgment*" is no part of the transcript, and no better than the unofficial assertion of the Justice, which would not be received if under oath.

*Wright's Appeal.* [From the Orphans' Court of Washington co.] ROGERS, J. Devise—"I will and bequeath to my wife my farm during her life time, and after her decease, to my son Thomas. If he chooses to accept of it, he is to pay $1700 — $1400 to my sons J. & S., $300 to my daughters M., and A., and J." creates no charge on the land.

*Thompson, Exec'r,* vs. *Playford.* [Fayette co.] BELL, J. The return of referees that the parties before them had agreed to adjourn to a different town, is sufficient evidence in a Court of Error of such adjournment.

*Jones* vs. *Shacklett & Glyde.* [Greene co.] President Judge S. A. GILMORE affirmed. Notwithstanding a distinct charge on books of original entry to one person, it is competent for the vendors to prove that at the time the entry was made, another person was liable as the vendee, for the merchandize sold.

Evidence of admissions made to witnesses, who anticipated a law suit and prepared to guard against it, is not weakened by such motives or precaution; on the contrary such intention might make them more distinct in their recollections.

*Garrard & Lants.* [Greene co.] BELL, J. Where the vendee of land himself becomes the purchaser at the judicial sale of the land, he remains liable for the residue of the purchase money due to the vendor. If a stranger purchases, this liability depends on the fact whether at the time

of the last sale, the vendee had in his hands a sufficient amount of the purchase money to extinguish the incumbrance.

The rule is not varied, whether there was a conveyance of the legal title, subject to the incumbrance producing the sale under execution, or the legal estate remained in the vendor and the judgment was recovered against him, after his sale to the vendee.

As the vendor is regarded as trustee of the legal title for the benefit of the vendee, so the latter is esteemed as trustee for the vendor of the beneficial interest in the land to the extent of the unpaid purchase money, and although after a judicial sale and purchase by the vendee, the vendor cannot enforce payment by ejectment; an action of covenant will lie in his favor. The vendee cannot keep the land and the money he promised to pay for it.

*Fullerton & Wade* vs. *Stouffer*. [Fayette co.] BURNSIDE, J. Where the rent was appropriated by the terms of the lease to the payment of a debt which the lessor owed to a third person, and for which the lessee was security, it is considered *paid* to the landlord from the time of the contract, and does not pass by a sheriff's sale, to the purchaser under the 119th and 120th sections of the act of 16th June, 1836.

*McClelland, for use* vs. *Smith et al.* [Greene co.] Per Cur. A bond under the act of Assembly of 12th July, 1842, to answer for fraud, &c. is well taken in the name of the Associate Judge.

Such a bond "to appear, answer and abide the decision" is null.

If there is an adjournment after appearance — there must be a new bond.

*Willis* vs. *Willis*. [Greene co.] COULTER, J. In a collateral proceeding notice of an inquisition of lunacy will be presumed, although not apparent on the record.

Although an attorney may refer his client's cause, yet he cannot enlarge the power of an auditor of the Orphans' Court, to whom specific powers were committed.

The return of the auditor is not evidence of the enlargement of his authority, nor his report under such supposed extended authority conclusive.

*Hill* vs. *Scott*. [Washington co.] COULTER, J. Original entries in a day book kept at a coal mine, partly written in pencil, are admissible.

The testimony of workmen employed about glass works supplied by plaintiff, received in corroboration of plaintiff's account — to shew the amount usually consumed there.

*Jones* vs. *Patterson*. [Fayette co.] BELL, J. One holding the legal estate in land, cannot support the plea of *non tenure*, in an action of dower *unde nihil habet* by force of his agreement with a purchaser, by which the

latter took a beneficial interest in the property to the extent of the purchase money paid.

Whether the legal tenant would be liable to damages under the Statute of Merton, which was not made in contemplation of distinct legal and equitable interests in the same land? *Dubitatur.*

*King* vs. *Deets.* [Fayette co.] BURNSIDE, J. Although the defendant claimed under a fraudulent deed from his father, made in contemplation of bankruptcy, he was allowed to retain possession against a sheriff's vendee of his father's estate, after shewing his father's discharge and assignment as a bankrupt, prior to the sheriff's sale.

*Hadden* vs. *Reeside.* [Fayette co.] Opinion of President Judge SAMUEL A. GILMORE affirmed and adopted. If there be two considerations for a promise, one good and the other not unlawful, but frivolous or worthless, the promise will be sustained.

Contrary to that anomaly of the law, existing as to a promise *revived* to avoid the effect of the Statute of Limitations, where a promise is made after a discharge by bankruptcy — the declaration should be on the new promise.

*The Estate of Blocker & Co., on the affidavit of Overholt.* [Fayette co.] ROGERS, J. Although an affidavit may not state all the grounds necessary to obtain an issue for the distribution of monies arising from a Sheriff's sale, yet if the application of the attorney state them, and the decision of the Court assume the facts necessary, the application will be sustained in this Court. On a question whether the debts were against partners, parol evidence will be admitted to explain the judgments and show that they were for partnership debts, although they appear on the record as ordinary judgments against the individuals of the firm.

*Mackey* vs. *Robinson.* [Fayette co.] GIBSON, J. A farm owned by seven children was let for a term of years by their father, with the permission of three of them — being adults. The father died in the middle of the term; neither debt nor assumpsit will lie for rent supposed to have accrued after his death — there being no contract with the tenants afterwards.

*Hamilton* vs. *Whitely Township.* [Greene Co.] ROGERS, J. Devise —"to my son Robert Richey's male heirs, all and singular my personal property, with the upper end of my plantation, reserving a living for myself and my wife Sarah as long as our natural lives continue — is a devise of the legal title in presenti, and the reservation of a living to devisor and wife in the nature of a charge payable out of the land. It is neither *vivum vadium*, or an estate on condition. Nor is there any estate in the land for which ejectment would lie. The remedy for recovery of the maintenance, is in the Orphans' Court.

*Hall* vs. *Stewart.* [Fayette co.] COULTER, J. An action of covenant will lie on an agreement under seal, between tenants in common, in relation to farming their common land, and plaintiff may in such action recover a reasonable rent, as expressed by said agreement upon proving what it should be to the satisfaction of a Jury.

*Watson & McCahan* vs. *Bagley & Smith.* [Washington co.] GIBSON C. J. A binding appropriation of money to a particular use by any writing is an assignment or transfer of its ownership, as by a letter of attorney — which is not revocable, if executed upon a sufficient consideration.

*Harger, et al* vs. *the Commissioners of Washington County.* BELL, J. A bond conditioned "that the obligors shall pay the costs imposed on G. H. by the Court of Quarter Sessions of W. County, of which he, the said G. H., in this case stands charged," may be enforced without any sentence being passed against said G. H. for the crime he was convicted of by verdict.

Before issuing an execution on a judgment entered by warrant on such bonds, the costs must be taxed by the proper Court or its officer — and items ascertained.

Restitution is, however, *ex gratia* and not of right, and will be refused where the process is set aside for a mere slip, and there is danger that plaintiffs may lose their demand.

*Brownfield* vs. *Brownfield.* [Fayette co.] C. J. A division line designated by will as running from "a post corner of J. B.'s land and the testator's home place", if there are in fact two such corners, is a latent ambiguity, and therefore not a subject of legal direction — but a pure question of fact for the Jury.

To remove a latent ambiguity, circumstances indicative of the testator's affections towards the object of his bounty, or the relative circumstances of his connexions, or his acts and declarations in respect to the thing given, or the person of the donee, are constantly admitted. Whether the testimony of the scrivener that the testator *intended* a particular corner was competent, depended on whether the testator had said so, or whether it was the mere opinion of the witness. If it were only the latter, it would be rejected, but the facts on which it was formed would be received. So testator's acts and declarations that he meant a particular corner would be competent and powerful evidence.

The relative amount of the advancements and comparative value of the land dependent on the selection of the corner are evidence to bear on the equality, which in the first instance is presumed to have been the aim of the testator.

## District Court of Allegheny County.

*Fieri Facias No.* 182, *April Term*, 1848.

JOHN VANERNAN *for use of* MARY PARKER, *vs.* ELIZABETH & JANE COOPER.

### MOTION TO SET ASIDE SHERIFF'S SALE OF LAND.

1. General principles and practice of the Courts in setting aside Judicial sales.
2. A Sheriff's sale set aside after the acknowledgmont of the deed, on the ground that after bidding a larger price for the property when first offered, it was struck down to the plaintiff at an adjourned sale for a less price.

Opinion of the Court by WALTER H. LOWRIE, Assistant Judge.

In the English practice we every where find the rule that the sale will be set aside, (the biddings opened is their phrase,) as a matter of course, merely on the tender of a proper advance on the biddings, on the applicant paying the costs of re-sale, 2 Smith Ch. Pr. 235. This may be a very proper rule in England, where, on account of the enormous cost of such proceedings, there is but little danger of the rule tending to discourage free competition or to encourage inattention in those concerned. But such a rule without great restrictions would be very inexpedient in this State, and I do not know that it has met with any favor in this country; though the same practice is sometimes very properly adopted where the sale is set aside for surprise on the parties interested, or where the inadequacy of price is so gross as to be evidence of surprise.

Sheriff's and other judicial sales are the legal means of effectuating certain remedies through the instrumentality of the Courts of Justice, and the Courts should see that the sale is fairly and publicly conducted so as best to at-

tain the designed end. If it be a sale for the payment of debts, that object should be kept in view. And, while proper care should be taken not to discourage full competition by unreasonably setting sales aside, nothing unfair, underhanded or unconscientious, no undue advantage, no carelessness of officers, no exercise of power to the injury of the sale should for one moment be tolerated. Veeder vs. Fonda, 3 Paige 94. And the plaintiff, who with us has practically very great control over the sale, will not be allowed the benefit of any improper advantage given him by his position. See Leisenring vs. Black, 5 Watts 303.*

A judicial sale of land is a proceeding *in rem* under the direction of the Court for the benefit of all concerned; and all the parties interested in the *thing*, (the defendants' title,) or having liens upon it, together with the purchaser, necessarily become parties before the Court as to all matters connected with the sale, and have a right to be heard, and are bound by the decision. 1 Sugd. vs. Vend. 65, Requa vs. Rea, 2 Paige 339, Casamajor vs. Strode, 1 Eng. Ch. Rep. 195, 8 Watts 280. The whole is a judicial proceeding, though merely clerical and executive in its character until sanctioned by the Court by allowing the deed to be acknowledged. It does not conclude the title of any one but the defendant, for it does not profess to act on any interest but his, and there may be a hundred owners, or his interest may be only a fancied one. Nor should it have any wider effect, for as there is no actual taking

*The case of Black *vs.* Leisenring may properly be cited for the *obiter* remarks of the judge, the soundness of which we do not remember ever to have heard questioned. But there is a defect in the proceedings of the Supreme Court which strips the case of all pretensions to the dignity of a *judicial decision*. The facts are entirely mis-stated in 5 Watts 303, and the opinion, through some unaccountable means, was predicated upon an *imaginary case* directly contrary to the record returned on the writ of error. It was so wide a departure from the question raised that the Court below, upon the second trial, was forced to disregard it as totally inapplicable to the case, and to *direct a verdict, as before, for the defendant*. The cause was never moved afterwards.—Ed. Am. L. J.

of the thing into the custody of the Court, no one can be presumed to have notice of the proceeding except parties and privies to the action—the defendant and lien creditors.

But on the interests of the parties before the Court it acts conclusively. The plaintiff in the action and the purchaser are parties by their own acts. The defendant and lien creditors are parties by necessity—from their relation to the property. This relation requires them to take notice of all authorised process in reference to the thing in which they are interested. And, perhaps, this is the principle upon which the various decisions upon the effect of the acknowledgment proceed, though it may not anywhere distinctly appear.

Thus an acknowledgment before the return day of the writ is void and no title passes, Murphy vs. M'Cleary, 3 Yeates 405, Glancy vs. Jones, 4 id. 212; for the same reason, I suppose, that a judgment before the return day of the summons is void—because the party was not before the Court at the time of the acknowledgment, and had no opportunity of being heard.

So of a sale after the return day of a fi. fa., Cash vs. Tozer, 1 W. & S. 519, because (formerly) the sheriff had lost his power to act, and the parties have notice only of what he may legally do. So also of a sale under void process, or a satisfied judgment, Burd vs. Dansdale, 2 Binn. 80, Fetterman vs. Murphy, 4 Watts 424, Hoffman vs. Strohecker, 7 ib. 86, Gibbs vs. Neely, id. 305. 1 Watts & S. 528.

But as fraud vitiates almost all sorts of proceedings, so it vitiates a sheriff's sale even where the parties have due notice of the sale, if they are not themselves parties to the fraud, for men may not hide their fraud even under the cover of a judicial record, and this objection may be made even after the acknowledgment of the deed. If the purchaser is guilty of any fraud in relation to the sale, he

may lose his title without being refunded the amount of his bid, 2 Watts 66, 354, 4 id. 424, 7 id. 305, and to some extent this is true even in case of constructive fraud, 5 id. 303. The employment of puffers is a fraud upon the purchaser, and it is said he may resist the payment of the price even after the confirmation of the deed, 2 Browne 346. So perhaps where the purchaser joins in an unfair combination to depress the sale, 1 W. & S. 128. These last, however, can usually be discovered in time to be made an objection to the acknowledgment, and in such case, perhaps, should be. If any of these frauds are discovered, even after the deed is confirmed and before delivery, I do not know why they cannot be made a ground of setting aside the sale on motion, without the need of a formal trial. Nor do I see any thing to prevent the court from interfering even after the deed has been delivered, if the money still remains in court undistributed. However, I waive this for the present.

It seems to me that, where the purchase is not tainted with any fraud, all objections not showing that the parties are not before the court, must be taken advantage of at the acknowledgment of the deed, or before the title is finally passed under the action of the court. Such are the cases where the purchaser asks for relief for defect of title, or others for inadequacy of price, 5 Serg. & R. 223, 9 id. 156, 397, 11 ib. 134, 6 Watts 140, or where there is an irregularity in the sheriff's proceedings, 1 Watts & S. 528, 8 Watts 280, 1 Bald. 246, 2 Yeates 387, or where there is a misdescription of the property or its improvements, 1 Rawle 155, 4 Wash. C. C. R. 45, 1 Watts & S. 533, 9 Watts 482, 9 Serg. & R. 162, 4 Yeates 203, or where several tracts are sold together, 2 Yeates 516, 18, 1 Binn. 61, or for mere clerical errors, 1 Serg. & R. 92, 111, 2 Dall. 93, 3 Watts 87, 4 ib. 416, or for variance between the writ or levy and the deed, 1 Rawle 155, or oth-

er irregularity of process, 1 Bald. 246. All these are cured by the acknowledgment of the deed, for they are all done under authority, and therefore the parties interested are bound to take notice of them, and make their objections before their interests are finally acted upon, and the purchaser has irrevocably parted with his money.

These grounds for setting aside judicial sales are abundantly sustained by the decisions of other courts. Thus where the sale would under the circumstances operate as a fraud on some of the parties, whether so intended or not. Jackson vs. Sternberg, 20 Johns. 49; and see 1 Browne 187, or where the party complaining has been misled by the acts of other parties, or of the officers, or even of third persons, Tripp vs. Cash 26 Wend. 143, Williamson vs. Dale 3 Johns. Ch. R. 290, Collier vs. Whipple, 13 Wend. 224, Mulks. vs. Allen 12 id. 253, 2 Paige 339, or for surprise or misapprehension alone, where the interests of the parties are seriously affected, Cook vs. Mancius 3 Johns. Ch. R. 424, Ontario Bank vs. Lansing 2 Wend. 260, Seaman vs. Riggins, 1 Green's Ch. R. 214, or where the quantity, quality, limits, or improvements are materially misdescribed, 3 Paige 94, Laight vs. Pell, 1 Edm. 577, Gower vs. Gower, 2 Edm. 348, or where the purchaser is led to understand that he is to get a good title, and it turns out otherwise, Morris vs. Mowett, 2 Paige 586, Seaman vs. Hicks, 8 id. 656, and see Anwater vs. Mathiott, 9 Serg. & R. 397.

These have all been sanctioned as sufficient grounds for setting aside judicial sales, and it is said that these grounds operate with especial force where the plaintiff is the purchaser; for, the purpose of the writ being to collect the plaintiffs debt, it is said (per Senator Verplanck, 26 Wend. 156,) to be a claim of strict justice to allow a resale upon terms that will secure the plaintiffs claim, and this is es-

pecially proper where the plaintiff exercises control over the process.

And the fact that the party complaining was present at the sale does not estop him from making these objections, though he may for this reason be held to stricter terms than otherwise. He may be required to stipulate for a larger advance on the resale, and to pay the costs of one sale, or even to pay his bid or part of it into court. The whole subject of opening biddings may be found treated of at large in 2 Smith Ch. Pr. 235, 2 Hoffman's do. 145, 2 Dan's do. 1465, Hoffm. Masters in Ch. 223, Sugd. Vend. c. 2. s. 2.

In this State the requisition that the party shall bind himself to procure an increased price on the resale is not unusual; though the order as to the costs is most probably omitted on the principle of *de minimis*.

I cannot think that there is any difficulty in applying these principles to the case before us. Here the plaintiff is the purchaser. When the property was first set up the plaintiff was the highest bidder, at the price of $310.— Then the plaintiff had the sale adjourned, and the next bidding the plaintiff became the purchaser at $25. It needs no reasoning to show that such an exercise of the plaintiffs power cannot be sanctioned either for his own benefit or for that of another. If the plaintiff adjourns the sale on his own bid, he cannot withdraw his bid, and go on with the sale after he has by his own act got clear of other bidders. The defendants property and the liens of creditors are not thus at the mercy of the plaintiff. There are, I think, other sufficient circumstances in this case to set aside the sale, but I choose to put the case simply on what I have stated.

But here it is objected that the money is paid, the writ returned, an al. fi. fa. issued, and the deed acknowledged, though not delivered the by sheriff; and it is said that,

with the acknowledgment of the deed, the power of the court is exhausted.

That the money is paid does not affect the question, for the purchaser is bound to pay so soon as the land is struck down to him. Scott vs. Greenough 7 Serg. & R. 199, Negley vs. Stewart 10 id. 207, Davis vs. Baxter, 5 Watts 515. And how can the court properly take the acknowledgment of the deed until officially informed of the sale by the return of the writ? And it is the practice of this court not to do it. The act of the purchaser (the plaintiff) in issuing the al. fi. fa. can surely not affect the question.

The whole objection then is that the deed has been acknowledged. It is said that after the deed has been acknowledged the title has completely passed *in rem judicatam*, and is beyond the power of the court. If this is true as to sheriff's sales, it is intensely more severe, in a case of very summary proceeding and with mere constructive notice to the parties, than the rule is in other cases where the notice is actual. For other defaults, even with actual notice, the power of the court is not thus restricted. The proceedings are considered to be still under the power of the court (even where the default is under an act of assembly and not under a rule of court,) at least until the other party has received the fruit of his judgment. And it is well known that the injustice of a contrary practice had much to do, in old times, in giving rise to the absurdity of a Court of Chancery to correct the injustice of the judgments of other courts.

If the argument be true, then the court cannot after the acknowledgment interfere with any part of the proceedings. The bed is made for the parties and they must lie in it. Purchaser, defendant, and lien creditors are without further remedy. Though the name of the purchaser, or of the defendant, or the description of the property, or all be wrong, yet the deed must stand as it is with all its ab-

surdities—no amendment can be made anywhere. Such seems to me to be the result of the argument, but such is not the practice. Rapin vs. Dealy, 1 Miles 339, McCormick vs. Mason 1 Serg. & R. 97, Cluggage vs. Duncan id. 111, Owen vs. Simpson 3 Watts 87, Jones vs. Gardner 4 id. 416. I do not think that M'Cullough's case, 1 Yeates 40, and Blair vs. Greenway 1 Browne 218, favor the argument as to the effect of the acknowledgment; for in those cases, or the facts are apparent, in aid of the acknowledgment, as reasons why the court *would* not, rather than *could* not interfere.

Though it is sometimes said that the title passes by the acknowledgment, and though for some purposes, it does pass of *as of that date*, yet it is not completely vested until the purchaser has received his deed. Scheerer vs. Stanly 2 Rawle 276, Robbins vs. Bellas 2 Watts 359. The acknowledgment is the sanction of the sale by the court, and the authority given by the court to the sheriff to deliver the deed. And surely this authority is revocable until executed, as most other delegated authority is. The *thing* has not yet passed out of the control of the court while it is in the power of its officers; and the parties interested may still be heard in relation to it. Such I have always understood to be the practice in this State, and it is more especially so where the plaintiff, the purchaser, is still in court seeking to collect the balance of his judgment.

When we examine the practice of other tribunals we find principles at least as broad as this recognized and acted upon. And it is important to notice that in Chancery the money is usually paid and the deed delivered before the sale is confirmed, so that after the confirmation, nothing remains to be done in passing the title.

Yet the practice of setting aside sales after confirmation is perfectly familiar—where the facts show a fraud

upon the lien creditors, 20 Johns. 49, or where the deft. was misled by the acts of the purchaser, 26 Wend. 143.— And in this last case the plaintiff was the purchaser, and had resold to an innocent purchaser at a profit; but he was compelled to credit the defendant with the profit of the resale. So where there is a mistake in the deed, 1 Cowen 220 (1 Miles 339) or material mistake in the description of the property, 2 Edm. 348, or other injurious mistake, misrepresentation or fraud, 2 Har. & Gill. 346, 5 Yerger 240, or where there has been an office confirmation after notice of intention to move to open the biddings and before opportunity to do so, 2 Smith's Ch. Pr. 244, 2 Sim. & Stu. 608. And generally wherever there is fraud in the purchaser, or fraud in some other person of which it would be against conscience for the purchaser to take advantage, or other circumstances that render the sale unconscientious. Morrice vs. Bishop of Durham, 11 Ves. 57, Prideaux vs. Prideaux 1 Bro. C. C. 287, Scott vs. Nesbit 3 id. 475, White vs. Wilson 14 Ves. 151.

It seems to me, therefore, both on principle and authority, that under the circumstances of this case, the acknowledgment of the deed presents no obstacle in the way of setting aside the sale. In an ordinary case of surprise for want of knowledge of a duly published sale, we should perhaps impose upon the complaining party the costs of sale and the burden of a stipulation for an increased bid. But the equitable plaintiff, the purchaser, is sister of the defendants, and I am much inclined to the opinion that she intended no injury *to the defendants*, by the sale of their land at this grossly inadequate price.

Let the acknowledgment of the Sheriff's deed be rescinded, and the sale set aside. The plaintiff, on application, can have the return of the sheriff, and the al. fi. fa. amended according to the altered state of the proceedings.

# High Court of Chancery.

## *In Chancery, March Term*, 1849.

ELYSVILLE MANUFACTURING COMPANY *vs.* THE OKISKO COMPANY.

1. The receipt in a deed acknowledging the payment of the consideration money may be contradicted, and under what circumstances.

2. A person who has received a certificate of stock in a manufacturing corporation, in consideration of the conveyance to the company of real estate, is not allowed to recover the consideration, as unpaid, on the ground that the sum required by the charter was not paid on each share of stock at the time of subscription. The other members of the company having advanced large sums of money which were expended for the common benefit on the said real estate, the holder is estopped from raising the objection to the subscription to the stock held by himself.

In this case, as reported for the Maryland Free Press, the following statement of facts is given :—

The bill in this case alleged that, on the 20th August, 1846, the complainants executed to the defendants a deed of certain property, lying partly in Howard district, and partly in Baltimore county, for the sum of $25,000; that the defendants had taken possession thereof, and peaceably occupied the same ever since; that, although a formal acknowledgment of the receipt of the purchase money was written on the deed, it had never in fact been paid; and that the defendants were threatening to sell the same without regard to the rights of the complainants. The bill prayed for an injunction to restrain the defendants from selling; and also, that the property might be sold under the direction of the court, to satisfy the complainant's claim.

The answer denied that the said purchase money was still due, and in explanation stated, that in the month of July, 1845, the Elysville Manufacturing Company, consisting of the five Messrs. Ely, the owners of the property

in dispute, being in want of means to conduct their operations, agreed with certain merchants in Baltimore, that if the latter would join with them and contribute the sum of $25,000, the company would convey to the association thus formed, the said property, and in consideration thereof, hold a like sum of $25,000 in the capital stock of the association thus formed; that the sum proposed was raised, in pursuance of the agreement; that this association was afterwards incorporated by the name of the Okisko Company; that the Elysville Manufacturing Company by Thomas Ely, its President, subscribed for two hundred and fifty shares of the capital stock, amounting to the sum of $25,000, as shown by an agreement filed with the answer; that the subscribers, other than the complainants, paid for their stock in cash, and that a certificate for two hundred and fifty shares was delivered to the complainants on the execution of said deed, and by them received as the true and only consideration therefor.

A great deal of testimony was afterwards filed in the cause, and exceptions to its admissibility were taken and argued at the hearing of the motion to dissolve the injunction, the nature of which will appear from the Chancellor's opinion.

As to the statement in the answer that the consideration money of the deed had been paid in stock, Chancellor JOHNSON said:

"It is the undisputed law in this State, that the receipt in a deed, acknowledging the payment of the consideration money may be contradicted; that it is only *prima facie* proof, and is exposed to be either contradicted or explained by parol evidence; and in this respect constitutes an exception to the general rule, which protects written evidence from the influence of such testimony, Higden vs. Thomas, 1 H. & G. 139; Wolfe vs. Hauver, 1 Gill 85.

But, although the receipt in the deed acknowledging the receipt by the vendor of the consideration may be disproved by parol, and an action maintained by him for the purchase money on the production of such proof, still it is insisted that the opposite party, the vendee, is held to the proof of the consideration expressed; and that he will not be allowed to support the instrument, by setting up a different consideration repugnant to that expressed.

In the case of the Union Bank vs. Betts, 1 Har. & Gill 175, the Court of Appeals decided that where a deed was impeached for fraud, the party to whom the fraud is imputed will not be permitted to prove any other consideration in support of the instrument.

The consideration offered to be proved in that case was marriage, and the attempt was to set up marriage as the consideration, in lieu of the money consideration expressed; but this was decided to be inadmissible, the deed beiug impeached for fraud. The proof, if admitted, would have changed the deed from one of bargain and sale to a covenant, to stand seized to the use of the grantee. In the case of the Union Bank and Betts, the disproof of the consideration expressed had rendered the deed fraudulent and void as a bargain and sale, and by admitting the parol proof offered, this void instrument would have been re-established as an instrument of a different character.

In every subsequent case decided by the Court of Appeals, the case of the Bank and Betts is explained in this way: that is, as having decided that when a deed is rendered inoperative and void by disproving the consideration expressed in it, evidence of a different consideration will not be received to set it up, Clagett and Hill vs. Hall 9 G. & I. 91. Cole vs. Albers and Runge, 1 Gill 433.

But the question presented in this case is of a different description. This deed is not impeached for fraud, as in the case of the Union Bank vs. Betts, and Cole vs. Albers

and Runge. The complainants in this case maintain the validity of the deed, and seek, upon the allegation that the consideration money has not been paid, to enforce its payment by the assertion of the vendor's lien. And the question is, whether in a court of equity he can be permitted to assert this lien and compel payment in this way of the consideration expressed in the deed, if it appears by the evidence that he has been satisfied for the purchase money, by receiving something else as an equivalent therefor.

In the case of Wolfe vs. Hauer, 1 Gill 84, which was an action of assumpsit, to recover the value of lands sold and conveyed, but not paid for, objection was made to the admissibility of parol evidence to disprove the acknowledgment in the deed; but the court admitted it upon the ground, that such acknowledgment was only *prima facie* evidence, and the plaintiff, the vendor, obtained the verdict and judgment. In that case as here, the deed was not impeached for fraud, nor was the evidence of non-payment offered to render it inoperative and void; and the Court of Appeals says: "the introduction of the evidence proposed to be offered, neither changes nor affects any right transmitted in the property conveyed by the deed; it operates no change in the legal character of the instrument, nor in any manner affects injuriously any part of the deed, as a conveyance; the receipt of the purchase money is no necessary part of the deed, as it would in every respect be as valid without it as with it."

The deed then being valid, and passing the legal title; and the bargainer therein not impeaching it as fraudulent, but claiming the aid of this court to enforce his lien as vendor, to recover the purchase money expressed in it, the question is, shall he be permitted to do so, if upon the evidence it is shown that he has received, not in money, but in something else of value, what at the time he considered as an equivalent for the money?

Suppose, in the case of Wolfe vs. Hauver the defendant, the purchaser, could have shown that he had paid, and the plaintiff had received, as an equivalent for the two thousand dollars, (the consideration expressed in the deed,) merchandize or other property; and that such was the agreement of the parties at the time the contract for the purchase was made? Can it be possible, that under such circumstances the complainant could have been allowed to recover a judgment for the purchase money? If he could, where would be the defendant's redress for a wrong so monstrous and palpable? If he could not defend himself at law, because he could not in the face of the deed prove any other than the payment of the monied consideration expressed, he would be equally defenceless in equity; because the rules of evidence in regard to explaining, or varying, or contradicting written evidence, are the same in both courts; and thus the court must unavoidably be the instrument in inflicting the grossest injustice.

If in the case now under examination, the consideration of the deed from the complainant to the defendant, instead of being, as is alleged, twenty-five thousand dollars of stock in the Okisko Company, had been the conveyance by the defendant to the complainant of real estate of the same value, and each deed had been upon a money consideration expressed, is it possible that upon a bill filed by one of the grantors, claiming the enforcement of the vendor's lien, this court must have given him a decree for a sale of the property, upon proof that the monied consideration expressed, had not been paid? And that the other vendor must in like manner proceed upon his equitable lien to recover his money, which in case of any serious deterioration of the property, from any cause, might be impossible.

The question in such a case would not be, whether a deed shown to be fraudulent and void, by disproving the

consideration expressed, could be set up by evidence of a different consideration; but whether a party asking the assistance of the court to enforce the payment of the purchase money, had *in fact been paid.* And whether paid in money, or in something which he agreed to receive as money, cannot be material.

I am therefore of opinion that the evidence is admissible.

It is said, however, that though the evidence may be admissible, there is no sufficient proof to establish either the agreement set up in the answer, or a valid subscription binding the complainant, the Elysville Manufacturing Company, to the stock of the defendant.

With regard to the agreement, that the complainant would convey to the defendant the property in the deed mentioned, in consideration of receiving twenty-five thousand dollars of the capital stock of the defendant, I am persuaded that a reasonable doubt cannot be entertained.

There is in the record a mass of evidence upon the point, both oral and written, which in my judgment irresistibly conducts the mind to the conclusion; and many of the well authenticated and admitted acts and declarations of the parties can be accounted for upon no other hypothesis. It would be tedious and useless to recapitulate the evidence upon which this conviction rests; and I content myself with saying, that after listening with much attention to the comments of counsel, and carefully reading the proof, I am unable to see how it is possible to arrive at a different result.

The only remaining question relates to the validity of the subscription by the complainant to the capital stock of the defendant. The subscription *in point of fact,* by the President of the former company, is not denied; nor is it denied that at or about the time the deed was delivered to the defendant, the Attorney in fact of the complainant,

by whom the delivery was made, received from the defendant a certificate for the stock, and that this certificate has never been returned to the defendant since.

The validity of the subscription is however questioned upon two grounds; first, because the President of the Elysville Company, by whom it was made, was not authorized to make it. And secondly, because the ten dollars on each share, required by the 8th section of the charter of the defendant, to be paid at the time of making the subscription, were not paid in money.

In urging the first objection it is said that a corporation aggregate must act collectively, and by vote or resolution. But though this may be true, it is now well settled in this country, that the acts of a corporation evidenced by a vote, written or unwritten, are as completely binding upon it, and as full authority to its agents, as the most solemn acts done under the corporate seal; and that promises and engagements may as well be implied from its acts, and the acts of its agents, as if it were an individual, Angel on Corporations, 60, 127, 128.

In the case of the Union Bank vs. Ridgely, 1 H. & G., 426, the Court says, "that the same presumptions arise from the acts of corporations as from the acts of individuals; consequently that the corporate assent, and corporate acts, not reduced to writing, may be inferred from other facts and circumstances, without a violation of any known rule of evidence."

And again, in Burgess vs. Pue, 2 Gill 254, the Court say, "a vote or resolution appointing an agent, need not be entered on the minutes, but may be inferred from the permission or acceptance of his services." "And that acts done by a corporation, which pre-suppose the existence of other acts, to make them legally operative, are presumptive proof of the latter."

Such being the law upon the subject, and it being quite

competent to this court, without the production of an express authority from the Elysville Corporation to its President to make the subscription in question, to infer it from other acts, I am clearly of opinion, that the facts and circumstances of this case are quite sufficient to warrant the inference—the fact of the receipt of the certificate by the agent of the complainant—its retention to the present time, so far as the record informs us, and that the stock has been voted on two occasions by an officer or member of the corporation of the complainant, are acts which presuppose the existence of the other acts, to wit: The authority to the President to make the subscription.

The other ground upon which the validity of this subscription is assailed, is that the ten dollars, required by the 8th section of the charter to be paid at the time of subscription, have not been paid.

It may be remarked upon this objection, that it is taken by a party who holds a certificate for the stock subscribed by him, and has held it for upwards of two years. That in consequence of this subscription, and the conveyance of the property, made by such party, the other members of the corporation have advanced large sums of money upon their subscriptions, which sums have been expended upon the property now attempted to be affected by the vendor's lien; and that if the efforts of the vendors are successful, the moneys so expended may be entirely lost to the associates of the vendors. The attempt therefore, as it seems to me, is destitute of any support in equity.—It appears to be quite apparent, that if these vendors had not subscribed for the stock, and executed the deed of the 20th August, 1846, the other members of the corporation would not have advanced their money. The subscription was not only made, and the deed executed, pursuant to the agreement of the parties, but there has been, so far as the record discloses, an entire acquiescence

on the part of the vendor, from that time until this bill was filed, in September 1848; and not only a passive acquiescence, but an active participation on the part of the vendor in the affairs of the corporation, by attending and voting at the corporate meetings. There do not appear to be any grounds for doubting, that until this bill was filed, the defendant considered the complainant a stockholder in the corporation; and that the money of the other corporators was expended upon the faith of that conviction; and my impression is, that conviction on the part of the defendant, was a natural result of the conduct of the complainant.

The case relied upon by the complainant's counsel in 1 Caine's Rep. 381. The Union Turnpike Company vs. Jenkins, is entirely unlike this case in some of its most essential features. In that case, which was an action of assumpsit brought by the Company against the defendant to recover certain payments called for, pursuant to the act of incorporation, the Court decided that the payment of ten dollars on each share, required to be paid at the time of subscribing, was essential to the consummation of the contract; and that without such payment the Court was at a loss to see any consideration for the promise to pay the remaining instalments. The subscription and payment were both regarded as necessary to perfect the contract. That unless the concurrence of both could be shewn, the defendant could not be regarded as entitled to the rights of a stockholder. And the Chief Justice remarked, that if the speculation had been an advantageous one, and before the first call of the President and Directors the stock had risen considerably in value, they could have refused to consider the defendant as a stockholder, on account of his not having made the payment required by the act, at the time of subscribing. This want of mutuality, therefore, was the ground upon which the defend-

ant was held not responsible for the payments called in. This constituted the want of consideration necessary to maintain the action.

But this case is not all like that. Here, the Elysville Company have received a certificate for the stock subscribed by its President, and have executed a deed to the defendant, of property, as the equivalent for, and in payment of the stock. The contract, therefore, is no longer executory, but is an executed contract on both sides; and the attempt here is, not to resist the performance of an executory agreement, upon the ground that some act was not done, essential to give it legal validity; but to cancel and abrogate a contract carried into full and complete execution by both parties. Suppose in the case referred to the defendant had paid up the instalments as they were called in, and had received a certificate for the stock; would it have been possible for him, or the company, thereafter to repudiate the subscription upon the ground that he did not pay the ten dollars at the time of subscribing? It seems impossible to suppose that this could be done; and yet such is the effort here on the part of this complainant. After paying as agreed upon; receiving a certificate for the stock; attending and voting at corporate meetings; and acquiescing for upwards of two years, during which large sums of money are expended by the other subscribers, an effort is made to repudiate the whole proceeding and recover back the consideration paid. I think this cannot be done, and shall therefore dissolve the injunction; and the decision of this motion necessarily disposes of the petition* filed the third of March last."

*The petition referred to was filed by the complainants, stating that the property in dispute was lying idle and unused, and was going to decay, and praying that it might be sold, and the proceeds of sale deposited in Court, to abide the issue of the cause.

## USURY LAWS.

"If a man is *compos mentis*, why should he not be allowed to give and receive any price he thinks fit, for money, as well as for any other article? and why should the legislature scrutinize the terms of a private contract for trade between individuals, if they are competent to manage their own affairs? It will scarcely be said that the same necessity for such enactments exists at this day, that called them forth in earlier times. In other words, that we have made no advance in the science of trade: that the infant state of commerce requires the fostering care of legislation: that the lawyers, doctors and farmers, who principally make the sum of our legislators, know better what is for the advantage of the mercantile interests, than do the merchants themselves; and, lastly, that our merchants must be restrained and prevented from cheating and robbing each other.

"What, then, after all, is the effect of our usury laws? It embarrasses business, keeps up the rates of interest, *usually paid*, induces a laxity of principle among the people, in respect to the obedience of our laws, and, in fact, offers a premium for unfair dealing. It checks the exercise of enterprize, and throws a stumbling-block in the way of commercial advancement." [Coppinger's Usury Laws.]

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## Recent English Decisions--Court of Exchequer.

### BOOSEY vs. PURDAY — 26TH APRIL AND 5TH JUNE, 1849.

**A foreigner has no copyright in works published by him at common law or by statute, and the assignee of a foreigner, although a British subject, stands in the same position as the assignor.**

This was an action to recover damages from the defendant for the infringement of the plaintiff's copyright in ten airs of the opera La Somnambula. At the trial before POLLOCK, C. B., at the London sittings after Trinity Term last, it appeared that Bellini, the composer, had, in February, 1844, assigned his copyright, according to the Austrian laws, to Ricardi of Milan, who, in June, 1844, assigned them to the plaintiff in

England. The plaintiff then registered the airs in pursuance of the in ternational copyright act of 1842. Nine of the airs were published at Milan and Paris at nine o'clock in the forenoon of June 10, 1831, and about two hours later in London, and the remaining air in London in June 1831, and at Milan in August, 1831. The Lord Chief Baron directed the jury that the plaintiff had not established an exclusive right to the copyright in the nine airs, but had as to the tenth. Verdicts having been returned accordingly, cross rules were obtained to set aside the verdict on the ground of misdirection.

*Cur. adv. vult.*

By the Court.—The case of *D'Almaine* vs. *Boosey*, 1 Y. & C. 289, in which Lord Abinger, C. B., held that foreign authors were entitled to copyright in their publications in England, and might enforce it, is not satisfactory. Such copyright must be acquired by statute, as none exists at common law, and in looking at the preamble of the statute of Anne, it appears that it was "to encourage learned men to compose and write usefu books," for the improvement of the citizens, it must be presumed, of this country, either by birth or residence. A British subject who becomes the assignee of a foreigner, has no better title than the assignor, and has therefore, no copyright, and the publishing abroad simultaneously makes no difference in the question.

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## *Nisi Prius.*

[Before Mr. Justice ERLE.]

VIRTUE (a pauper) v. PAINTER.—23d January, 1849.

### FALSE IMPRISONMENT—REASONABLE AND PROBABLE CAUSE.

In an action for false imprisonment upon a charge of felony, the question of malice is for the jury, but the question of reasonable and probable cause is exclusively for the judge to determine.

The plaintiff, a cabman, was found at ten o'clock at night in a yard where he was accustomed to come to hire cabs, harnessing his horse to a cart belonging to the defendant, and the defendant gave him into custody, upon a charge of attempting to steal his cart. The plaintiff suing in *forma pauperis*, brought an action for false imprisonment. Upon the proof of these facts, Erle J., left it to the jury to say if the defendant had been actuated by malice, and intimated his opinion, that if the defendant had

reason to believe the plaintiff intended to steal his cart, there was no ground for supposing he was influenced by any malicious motive. The jury, after some discussion, found that the defendant was actuated by malice, and gave the plaintiff a verdict with 10*l.* damages.

Erle, J., said—He had left all that he ought to the jury, and then came the question of reasonable and probable cause; and that was for him. As at present advised, it seemed to him there was reasonable and probable cause. The plaintiff must, therefore, be non-suited, but with leave to move to enter a verdict for the plaintiff, if the court should be of opinion there was an absence of reasonable and probable cause.

Plaintiff non-suited.

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## HON. CHARLES MINER.

This distinguished citizen has issued an address to the Bench and the Bar of Pennsylvania, the object of which is to correct certain alleged inaccuracies in Judge Huston's late work on the Pennsylvania Land Titles. We have known these distinguished gentlemen so long, and esteemed them so highly as able and zealous friends and co-laborers in the great struggle in defence of the rights of the settlers under the Connecticut title, that Mr. Miner's address was read with surprise and pain. It is evident, however, that the statements in Judge Huston's Law Work, were not made with any intention to do injustice to the amiable and enlightened author of the History of Wyoming. When we have leisure and space we may take occasion to speak of the *Connecticut Question*, as connected with the land titles of Pennsylvania. In the mean time, we present our readers with the following article, which is annexed to Mr. Miner's recent publication. It is inserted for the purpose of showing that the notion that Courts of original jurisdiction have no right to decide constitutional questions, is a heresy of recent origin. It will be perceived, from the following, that in 1802 Judges Yeates and Brackenridge, in a criminal case, submitted the constitutionality of the "*Intrusion Act*" to the Jury.

[From the Luzerne Federalist of May 10, 1802.]

### REPORT OF THE INTRUSION CAUSES.

Wilkes-Barre, May 6, 1802.

"On Monday last, the Hon. Supreme Circuit Court of this State commenced their session for the purpose of trying the Intrusion causes, which have been depending in the Quarter Sessions since the last August term.

The Hon. Jasper Yeates and the Hon. Hugh H. Brackenridge, Esq's presided as Judges.

On Tuesday the cause of John Franklin, John Jenkins, Elisha Satterlee, and Jos. Biles, was before the Court. The three first were charged in the indictment with "combining and conspiring to convey, possess and settle lands in this County since the 11th of April, 1795, under titles not derived from this commonwealth," and the latter with surveying and laying out townships contrary to the intent and meaning of the intruison act.

The counsel engaged for the Commonwealth, were Messrs. Duncan, Sitgreaves, Smith, Hall, and Bowman;—for the defendants, Messrs. Dick, Evans, Griffin, Welles, Walker, and Huston. After the testimony on the part of the commonwealth was heard, Mr. Dick opened the cause, addressing the Court in a lengthy speech on the constitutionality of the law on which the indictments were founded. He was answered by Mr. Duncan, who was replied to by Mr. Evans. Mr. Sitgreaves then made some observations on a particular point of law, when Mr. Griffin closed the arguments in behalf of the defendants, and Mr. Dan Smith for the Commonwealth. There being a disagreement in sentiment between the Court, Mr. Brackenridge (the junior Judge) addressed some very pertinent observations to the jury; he recapitulated the principal arguments advanced by counsel, and independently gave his opinion that the Intrusion law was unconstitutional; he informed them that they were competent to decide on its constitutionality; that if they conceived it to be unconstitutional, it was their duty to declare it, and the indictment would of course fall to the ground.

Judge Yeates then addressed the jury.—He used several arguments in support of the constitutionality of the law, and also informed the jury it was their province to decide on its constitutionality. He called into view the principal points of the testimony of the different witnesses, and pointed out to the jury the facts which must govern their decision.

The jury returned a special verdict in which they found the facts against two of the defendants, Franklin and Jenkins, subject to the opinion of the Court upon the question of the constitutionality of the Intrusion law. The Court—being divided in opinion, no judgment was passed—but the final decision of the cause was deferred to the next session of the Supreme Circuit Court in Luzerne County, which will probably be held during the next spring. Satterlee and Biles were acquitted by the jury. The Court then ordered a *nolle prosequi* to be entered in the case of all those gentlemen who were under rocognizances for their appearance, the counsel being conscious of the defects in the indictment for intrusion. And their recognizanzes were taken for their appearance at the sitting of the Quarter Sessions to be holden in this County in August next."

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THE HON. CHARLES HUSTON.—This distinguished Jurist is no more. He was an able and eloquent advocate and an upright Judge. He was for a number of years President of the Common Pleas, and was appointed in 1826 an associate Justice of the Supreme Court, which office he continued to hold until the expiration of the time prescribed by the amended Constitution of 1838. Shortly before his death, he had completed his work on the Land Titles of Pennsylvania.

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